1987

State of Utah v. Lee Allen Aase : Petition for Rehearing

Utah Court of Appeals

David L. Wilkinson; attorney general; attorney for respondent.
Randine R. Salerno; attorney for defendant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	PETITION FOR RE-HEARING
Plaintiff-Respondent,	:	
vs.	:	
LEE ALLEN AASE,	:	
Defendant-Appellant.	:	Case No. 870276-CA Before Judges: Garff, Billings and Greenwood.

PETITION FOR RE-HEARING

PETITION FOR RE-HEARING FROM A DECISION RENDERED ON THE 14TH DAY OF OCTOBER, 1988, AFFIRMING THE CONVICTION OF THE ABOVE-NAMED DEFENDANT/ APPELLANT IN THE SECOND JUDICIAL DISTRICT COURT OF DAVIS COUNTY, STATE OF UTAH, BY THE HONORABLE RODNEY O. PAGE.

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Plaintiff-Respondent,	:	
vs.	:	
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Defendant-Appellant.	:	Case No. 870276-CA Before Judges: Garff, Billings and Greenwood.

BASIS OF JURISDICTION

Jurisdiction of this appeal is confired upon this Court pursuant to Rule 35, Rules Of The Utah Court Of Appeals, effective April 10, 1987.

NATURE OF PROCEEDINGS

The Defendant-Appellant requests a Re-Hearing from a decision rendered on the 14th day of October, 1988, affirming a jury verdict finding him guilty of attempted criminal homicide, rendered on the 11th day of May, 1987, in the Second Judicial District Court of Davis County, State of Utah, the Honorable Rodney O. Page presiding. Defendant-Appellant filed his Notice Of Appeal with the Utah Court Of Appeals on July 10, 1987. The Court rendered its decision with regards to the above-entitled matter on the 14th day of October, 1988.

STATEMENT OF THE ISSUE

1. The Court of Appeals made an erroneous determination as to the Defendant-Appellant's claim that he is entitled to a new trial because the jury was permitted to adjourn for lunch, during its deliberations, without an officer sworn to keep them together as required by §77-17-11, Utah Code Annotated (1982).

STATEMENT OF THE CASE

Defendant, LEE ALLEN AASE, was charged with attempted second degree murder, a second degree felony, under §§76-5-203 and 76-4-101, Utah Code Annotated (1978 and supp. 1987)(R.60-64). The Utah Court Of Appeals affirmed his conviction in an opinion rendered on the 14th day of October, 1988.

STATEMENT OF FACTS

The issues raised by the Defendant-Appellant on the Petition For Re-Hearing generally do not require a resistation of facts beyond that contained in the Statement of Facts in his Appeal. However, Defendant-Appellant brings to the Court's attention that after the Defendant-Appellant had rested his case at trial, and after the parties had concluded their closing arguments, and after the bailiff had been sworn to take custody of the jury for its deliberations, and without knowledge of defense, the jury, during its deliberations, was permitted to recess for lunch prior to the rendering of its verdict. T.T. Vol. III, Page 78 and Pages 4 and 5 of the Addendum, Minute Entry of May 11, 1988, and the Juror's Affidavit attached hereto. Further, the

Defendant did not discover the impropriety alleged herein until after he had been sentenced and his Notice Of Appeal filed with the Court. It was the Defendant-Appellant's understanding that jurisdiction had transfered to the Utah Court Of Appeals prior to his discovery of reversible error. Therefore, no objection could have been made to the Trial Court.

ARGUMENT

THE COURT OF APPEALS MADE AN ERRONEOUS DETERMINATION AS TO THE DEFENDANT-APPELLANT'S CLAIM THAT HE IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY WAS PERMITTED TO ADJOURN FOR LUNCH, DURING ITS DELIBERATIONS, WITHOUT AN OFFICER SWORN TO KEEP THEM TOGETHER AS REQUIRED BY §77-17-11, UTAH CODE ANNOTATED (1982).

In affirming Defendant-Appellant's conviction, this Court held that the issue as to whether Aase is entitled to a new trial because the jury was permitted to adjourn for lunch during its deliberations without an officer sworn to keep them together could not be raised for the first time on appeal because it was not raised before the trial Court. James v. Preston, 746 P.2d 799, 801 (Utah Court. App. 1987) has been cited as the controlling authority. Apparently in support of its decision not to consider the question arising from the alleged irregularity in the District Court proceedings, this Court incorrectly stated, at page 6 of the Opinion, that "the record on appeal contains no indication that the unescorted lunch occured".

Clearly the principle that matters not raised in the pleadings nor put in issue at the trial may not be raised for the first time on appeal promotes the prompt and efficient

administration of justice. As the Court stated in Bundy v. Century Equipment, 692 P.2d 754, 758 (Utah 1984), citing Simpson v. General Motors, 24 Utah 2d, 301,303,470, P.2d 399, 401 (1970).

> Orderly procedure, whose proper purpose in the final settlement of controversies, requires that a party must present his entire case and his theory or theories of recovery to the trial Court; and having done so, he cannot thereafter change to some different theory and thus attempt to keep in motion a merry-go-round litigation.

See also James v. Preston, Supra @ P.50.

This rule cannot, however, operate to effectively eliminate constitutional as well as statutary protections guaranteed to criminal defendants, especially where the Defendant harmed as a result of the violation has no notice of the violation and logically, therefore, has no opportunity to object.

The Supreme Court has recognized that "exceptional circumstances " may arise requiring a review of matters raised for the first time on Appeal. State v. Steggell, 660 P.2d 252, 254 (Utah 1983). Here, the exceptional circumstances are that neither Defendant nor his attorneys knew of the unescorted lunch until jurisdiction had been transfered to the Court of Appeals. If the Defendant and his attorneys had been appraised of the unescorted lunch, or even the possibility thereof, they would have made their objection clear to the trial judge. It should not be presumed that any attorney defending a prisoner charged with a felony crime would permit this type of irregularity without objection.

In State v. Morgan, 23 U. 214 (1900), James Morgan was convicted of first degree murder and sentenced to death in July, 1899. His conviction was affirmed on Appeal and remanded for an Order requiring execution of the death penalty. After the case had been remanded to District Court, a Motion was filed requesting a new trial on grounds that he had recently discovered that jurors had responded falsely to voir dire questions concerning any bias they may have had towards Morgan prior to his trial on the matter. The declarations of the jurors, as set out in Affidavits, were unknown to either the Defendant or his attorneys until July 26, 1900, 24 days after the District Court had entered a new Order to execute Morgan pursuant to the remand. The Motion was denied and this Appeal followed.

In vacating the judgment and granting Morgan a new trial, the Court articulated several principles of law which are intregal parts of the foundation upon which our criminal justice system has been built and exists today. At the forefront is the principle that a "Defendant on trial for felony is entitled to all the protections which (a) statute intends to secure..." Id. @ P. 224. The proposition which necessarily goes hand in hand with that fundamental principle is that "The (Supreme) Court is constituted to enforce legal rights and redress legal wrongs, and whenever it is made to appear, as it is in this case, that a wrong has been perpetrated, it does not hesitate to exercise the power with which it has, unless to do so would do a greater

injury than to refuse to exercise it." Id. @ P. 231.

In Morgan, the State had argued that a new trial could not be had because the rules did not provide grounds upon which to base the Motion and because the Motion had not been made timely. But the Court responded by pointing to §12, Article 1 of the Utah Constitution guaranteeing the right of an accused in a criminal case to have a speedy, public trial by an impartial jury and the right to Appeal in all cases. The Court pointed out that "when a wrong is the violation of constitutional rights the legislature has no power to prohibit or substantially impair (the) remedies." Id. @ P. 228. Justice Hart, writing for the majority, went on to point out that

> In the absence of any legislative remedy for such wrongs, the Courts will resort to the common law if it affords a remedy, and if it does not, then the Courts, by virtue of their inherent power, and their duty in criminal cases to guard the rights of the persons will, if possible, devise new remedies, as has been done from a very remote period of time, by equity Courts, to meet new conditions and supply remedies for wrongs, when none already existed... (For) a right of which the person can not avail himself is practically no right. (Bishop on Criminal Procedure, §§113, 115, 307).

Id @ P. 228, 229.

During the course of a criminal prosecution, the accused has an absolute right to an impartial jury. In conjunction therewith, he has a right, and the Court has a responsibility to ensure, that whenever there is communication with the jury during its deliberations, the accused will be present. For how can he

exercise any right if he is not permitted to participate in all proceedings which may well result in his loss of liberty or life. The Court's communication with the jury during its deliberations on May 11, 1987, were ex parte. Neither Defendant nor his attorneys were present. Moreover, the unescorted lunch was not discovered until long after judgment had been entered. This Court had a duty on Appeal to review the Bailiff's Affidavit and the record and to fashion a remedy for Appellant. Anything less deprives Appellant of his Constitutional right to Appeal. Please see attached, Addendum at P. 5, the Juror's Affidavit.

There can be no rule depriving an accused of due process or equal protection of the law simply because a violation thereof goes undiscovered for a period of time subsequent to his trial on the matter. Indeed, §11, Article 1 of the Constitution of the State of Utah specifically provides that "All Courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law..." To say that Appellant has no remedy for the violation of law requiring an officer to keep his jury together, safe and private during deliberations and guaranteeing an impartial jury is to say that he has no right to have these protections. This cannot be the result this Court intended. As Justice Greenwood stated in her opinion, at page 6, "if the jurors were, indeed, allowed to go to lunch at a public restaurant, unescorted by the bailiff, the statute was clearly violated."

The record does disclose that the jury was excused for lunch during its deliberations. Neither the Defendant-Appellant nor his trial attorneys were present when the trial judge called the jury into the courtroom during deliberation and excused them for lunch. The minute entry of May 11, 1987 states, under no uncertain terms, that the bailiff was sworn and the jury excused for deliberations at 11:50 a.m.. Sometime between 11:50 a.m. and 3:35 p.m., when they returned to find the Defendant guilty, they were "returned to the courtroom and excused for lunch." Addendum @ Pages 4 and 5 (T.T. Vol. 3 @ Pg. 82). The bailiff did not go with them nor did he keep them private and together. Because the trial took place in a small community involving a high profile local crime, prejudice must to be presumed.

This Court has refused to consider the Bailiff's Affidavit attached to Appellant's Reply Brief in a consideration of Appellant's arguments on Appeal even given the unusual manner with which the jury was handled during its deliberations. To hold that this Affidavit does not fit within a well-defined rule governing submission of jury affidavits on appeal misses the point. Appellant understands that juror Affidavits are generally inadmissible to impeach the jury's verdict with two exceptions: "1) When the verdict was determined by chance or bribery, U.R.C.P. 59(a)(2); Groen v. Tri-O-Inc, 667 P.2d 598, 603 (Utah 1983); Deats v. Commercial Security, 746 P.2d 1191 (Utah App. 1987); Hillier v. Lamborn, 740 P.2d 300, 304 (Utah App. 1987); or

2) to establish "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to hear upon any juror." Hillier, 740 P.2d @ 305; Utah R. Evid. 606(b). Pritcher v. Department of Employment Security, 80 Utah Adv. Rep 20, 23 (1988). The Appellant, however, does not challenge the conduct of the jury, nor does Appellant question the process by which the jury reached its verdict. Appellant challenges the irregularity in the proceedings which deprived him of a safe and private jury. Appellant further challenges the Order of the trial Court permitting the jury to be excused for lunch, unescorted, as an abuse of discretion which prevented him from having a fair trial. Rule 59(a)(1), Utah Rules Of Civil Procedure. In this respect the underlying policy of preventing attempts to undermine the integrity of verdicts which limits the availability of Affidavits on Appeal does not apply to the facts and circumstances of this case. To hold otherwise would deny Appellant his right to Appeal the trial Court's Order permitting the jury an unescorted lunch in violation of Section 12, Article 1, Utah Constitution and §77-17-11, Utah Code Annotated.

The Court has held strong fast to the proposition that the right to Appeal is a fundamental right. State v. Morgan, Supra. It would be unconsicionable, given the facts and circumstances of this case, for the Court to refuse to consider the unescorted lunch and all of its ramifications. Appellant

requests that this Court remand this case to the District Court for a new trial.

DATED this 27th day of October, 1988.

RANDINE SALERNO
Attorney for Defendant-Appellant

CERTIFICATE OF HAND DELIVERY

I hereby certify that I hand delivered a true and correct copy of the foregoing to: David L. Wilkinson, Attorney General, 236 State Capitol Building, Salt Lake City, Utah on this 28 day of October, 1988.

RANDINE SALERNO
Attorney for Defendant-Appellant

ADDENDUM

Plaintiff

vs.

LEE ALLEN AASE

Defendant

Date _____

5514

Case No. _____

RODNEY S. PAGE, Judge
Hal Rees, Reporter
Leslie Snow, Clerk

This is the time set for jury trial. The State is represented by William McGuire and J. Mark Andrus. The defendant is present and represented by Randine Salerno and Kevin Sullivan.

A jury is impaneled. Those chosen to serve are as follows:

Michael J. Logan
Dan R. Eastman
Claudia J. Seifert
Terri M. Brown
Lynn K. Porter
Julie Nisbet
Gary E. Hogge
M. Jolene Potter
Marjorie E. Newson

The Information is read aloud by the Clerk.

Preliminary instructions are given by the Court to the jury. Exclusionary Rule is invoked. Opening statements are given by counsel.

Court is adjourned for lunch and is resumed in session. Counsel and Court are in chambers along with the defendant and Larry Lewis who is representing KSL TV. Court will allow still pictures in the courtroom on the condition that no pictures are taken of the jury or with any member of the jury in view. There will be one photographer allowed and he is to confine himself to

~~WHEADON, Peter K.~~
~~Centerville, Utah~~
TP #4 W

PORTER, Lynn K.
Bountiful, Utah

~~STAPP, Susan~~
~~Farmington, Utah~~
KPS #2 D

~~SWAPP, Holly~~
~~Bountiful, Utah~~
KPS #5 D

POTTER, M. Jolene
Bountiful, Utah

offered and received.

Dan Jones is sworn and testifies. Exhibits K, RR, S, H, I J, O, P, Q, R, SS, T are offered and received.

William Holthaus is sworn and testifies. Exhibits E, U, V, X, TT, W, ZZ, BB, & CC are offered and received.

Gary Briant is sworn and testifies. Exhibit FF is offered and received.

David Kennepohl is recalled and testifies. Exhibit PP is offered and received.

Reed Mecham is sworn and testifies.

William Holthaus is recalled and testifies.

Dick Martin is sworn and testifies. Court will adjourn for the evening.

May 8, 1987

Court is resumed in session. Parties and counsel are present, jury is present and accounted for.

Dick Martin resumes the stand and is admonished that he is still under oath. Exhibits 1, JJ, KK, LL, MM, & NN are offered and received.

Court meets in chambers with counsel and defendant. Testimony is proffered by the State regarding the testimony of Idaho police officers who stopped the defendant some time in 1985 and found he was carrying a gun loaded with snakeshot and hollowpoint rounds. Court finds that because of the length of

~~WHEADON, Peter K.~~
~~Centerville, Utah~~
TP #4 W

FILME

[illegible]
Bountiful, Utah

~~STAPP, Susan~~
~~Farmington, Utah~~
KPS #2 D

~~SWAPP, Holly~~
~~Bountiful, Utah~~
KPS #5 D

POTTER, M. Jolene
Bountiful, Utah

outweighs its prejudicial effect.

Court is resumed in session. Michael Stewart is sworn and testifies.

Raymond Cooper is sworn and testifies. Exhibit HH is offered and received.

Steve Major is sworn and testifies.

Court is adjourned for lunch and is resumed in session.

Mitchell Brock is sworn and testifies.

Danny Glover is sworn and testifies.

LaVee DeGarlis is sworn and testifies.

Craig Shaw is sworn and testifies.

Larry Gaines is sworn and testifies.

David Brazil is sowrn and testifies.

Ina Ray Ance is sworn and testifies. Exhibits II, OO & UU are offered and received.

State rests.

Court is in chambers. Defense moves for directive verdict. Court finds that the jury could believe all of the inferences and if they did, there is sufficient evidence to take the matter to the jury and the motion is denied.

Sheila Rowland is sworn and testifies.

Gloria Walters is sworn and testifies.

Gary Jenkins is sworn and testifies.

Court is adjourned for the evening.

May 11, 1987

This is the time set for continued trial. Counsel and defendant are present, the jury is present and accounted for.

~~WHEADON, Peter K.~~
~~Centerville, Utah~~
TP #4 W

FILME

Bountiful, Utah

~~STAPP, Susan~~
~~Farmington, Utah~~
KPS #2 D

~~SWAPP, Holly~~
~~Bountiful, Utah~~
KPS #5 D

Court gives jury instructions. Counsel give closing arguments. Ms. Seifert is excused as alternate juror.

Bailiff is sworn and jury is excused for deliberation at 11:50 a.m.

Jury is returned to the courtroom and is excused for lunch. They are present and accounted for an continue deliberation. Jury is returned at 3:35 p.m. and find the defendant guilty of Attempted Criminal Homicide. Defendant is referred to AP&P for pre-sentence investigation and sentence is set for June 9, 1987 at 1:30 p.m. Jury is polled. Jury is excused and court is adjourned.

~~WHEADON, Peter K.~~
~~Centerville, Utah~~
TP #4 W

~~STAPP, Susan~~
~~Farmington, Utah~~
KPS #2 D

FILME

PORTER, Lynn K.
Bountiful, Utah

~~SWAPP, Holly~~
~~Bountiful, Utah~~
KPS #5 D

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

STATE OF UTAH,	:	JUROR'S AFFIDAVIT
Plaintiff-Respondent,	:	
vs.	:	
LEE ALLEN AASE,	:	
Defendant-Appellant.	:	Case No. 870276-CA Before Judges: Garff, Billings and Greenwood.

STATE OF UTAH)
: ss
COUNTY OF DAVIS)

COMES NOW, JULIE NISBET, of Bountiful, Utah, State of Utah, County of Davis, and after having been duly sworn, deposes and affirms under oath as follows:

1. That I am JULIE NISBET and am your affiant herein.

2. That I was called to jury duty and sat as a juror during the trial of Lee Allen Aase in May of 1987. I participated in deliberations with regards to the criminal charges that were filed against Mr. Aase.

3. That on the 11th day of May, 1987, the last day of Mr. Aase's trial, and during the period of time that we were deliberating concerning evidence presented during Mr. Aase's trial, we were released by the Court to go to lunch. Myself, along with two or three other juror's, went across the street to a public restaurant and ate. We returned back to the courtroom

at approximately 1:30 p.m. as we had been instructed by the Court.

DATED this 26th day of October, 1988.

JULIE NISBET, Juror

SUBSCRIBED and SWORN to before me this 26th day of October, 1988.

NOTARY PUBLIC
RESIDING IN: Ogden, Utah
MY COMMISSION EXPIRES: 1-06-92

IN THE UTAH SUPREME COURT

JAMES D. CLARK, in his capacity as Personal Representative for the ESTATE OF DALE D. CLARK, Plaintiffs and Appellees, vs. MARK B. ARCHER, an individual, Defendant and Appellant, BONNEVILLE SUPERIOR TITLE, COMPANY, INC., a Utah Corporation Defendant and Appellee.	**APPELLANT'S REPLY BRIEF** 20090309-SC Trial Court No. 060601640 Appellate Case No. 20081007

Appeal

Appeal from the Second Judicial District Court
Honorable Thomas L. Kay

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IN THE UTAH SUPREME COURT

JAMES D. CLARK, in his capacity as Personal Representative for the ESTATE OF DALE D. CLARK, Plaintiffs and Appellees, vs. MARK B. ARCHER, an individual, Defendant and Appellant, BONNEVILLE SUPERIOR TITLE, COMPANY, INC., a Utah Corporation Defendant and Appellee.	**APPELLANT'S REPLY BRIEF** Trial Court No. 060601640 Appellate Case No. 20081007

Appeal

Appeal from the Second Judicial District Court
Honorable Thomas L. Kay

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Rebuttal Argument on Question Presented:

I. THE COURT OF APPEALS RETAINED JURISDICTION TO CONSIDER PETITIONER ARCHER'S APPEAL WHERE ARCHER FILED HIS INTERLOCUTORY APPEAL.

Clark's initial argument in his brief seems to confuse the issue currently pending before this Court. Clark argues that a lack of filing a writ of certiorari after the denial of the petition for interlocutory appeal, this Court now lacks jurisdiction to hear Archer's appeal on the case in its entirety. However, the Court specifically placed at issue only one question for this briefing:

> Whether the Court of Appeals erred in holding that it lacked jurisdiction to consider Petitioner's appeal and that Petitioner had waived the opportunity to challenge the propriety of a rule 54(b) certification in connection with his appeal.

Thus, Clark's argument fully misses the point. The question is whether the Court of Appeals retained jurisdiction due to the fact that Archer timely filed a notice of appeal after the trial court erroneously certified its judgment as "final". Archer argues that, due to the Court's decision in Cedar Surgery Center, L.L.C. v. Bonelli, 2004 UT 58, 96 P.3d 911 (Utah 2004), Archer preserved his appellate right by filing his petition for interlocutory appeal. As Archer properly filed his Notice of Appeal, the Court of Appeals maintained jurisdiction to hear this appeal in its entirety.

The petition for interlocutory appeal was timely filed under the restraints of both Utah R. App. P. 4 and 5. Clark argues that Archer missed the 20-day deadline

under Rule 5. However, as the Index to the Court Record indicates, the "Notice of Entry of Final Judgment on Plaintiffs' Second Cause of Action" was filed on March 17, 2008. The Notice of Filing of Petition for Appeal was filed on April 7, 2008. This is twenty-one days after the entry of the trial court's order. However, the twentieth day after entry was Sunday, March 16, 2008. Pursuant to Utah R. App. P. 22, if the final day of a period of time to file a document is a Saturday, Sunday or legal holiday, the period extends to the following day that is not a Saturday, Sunday or legal holiday. Archer timely filed his notice of appeal under each of the Rules of Appellate Procedure.

The Court of Appeals' underlying denial of Archer's appeal is based on Lindsey v. Beneficial Reinsurance Co., 59 F.3d 942 (9th Cir. 1995). In its decision, the Court of Appeals erroneously determined claim that Defendant Archer had failed to file an appeal of the trial court's decision. The entirety of the case law surrounding the point of law relied upon in Lindsey also rests on the premise that the party seeking appeal at the end of the case had failed to file an appeal of the order within the time frame allowed by Rule at the issuance of the trial court's decision. In this case, however, Defendant Archer did file a timely appeal of the decision. According to this Court's ruling in Cedar Surgical Center LLC, Defendant Archer's Petition for Interlocutory Appeal was sufficient to preserve Archer's appeal rights regardless of whether the 54(b) certification was proper.

Further, as demonstrated in the opening brief, the time for appeal of an improper Rule 54(b) certification does not start until all issues have been resolved at the trial level. In re Integra Realty Resources, Inc., 262 F.3d 1089 (10th Cir. 2001); Buckley v. Fitzsimmons, 919 F.2d 1230, 1237 (7th Cir. 1990), modified on other grounds, 952 F.2d 965 (7th Cir. 1992), reversed on other grounds, 113 S. Ct. 2606 (1993). Therefore, even where Archer did not file a petition for *writ of certiorari* with regard to the Court of Appeals' denial of Archer's petition for Interlocutory Appeal, where the Rule 54(b) certification is improper, the time to file an appeal did not begin to run until all matters before the trial court were resolved.

Accordingly, Defendant Archer's appeal of the district court's Rule 54(b) certification, was not untimely.

II. ARCHER PRESERVED HIS RIGHT TO CHALLENGE THE COURT OF APPEAL'S DECISION TO DENY THE APPEAL ON JURISDICTIONAL ISSUES.

Clark argues that Archer failed to raise his argument under Cedar Surgery Center v. Bonelli, until Archer's opening brief and therefore Archer has waived his ability to raise this argument. In fact, in Archer's Petition for Writ of Certiorari Archer stated as follows:

> The Court of Appeals, in its February 20, 2009 dismissal of Defendant Archer's appeal, stated that Defendant Archer had failed to timely file an appeal from the trial court's erroneously certified order. In fact, on March 31, 2008, Defendant Archer did appeal the trial court's order.

> Defendant Archer sought permission to file an interlocutory appeal on the matter.

Archer did not cite to Cedar Surgery Center, LLC v. Bonelli, but the argument was presented. Further, this Court specifically directed the parties to address the issue regarding whether the Court of Appeals erred in holding that it lacked jurisdiction to hear Archer's appeal. Nothing in the two footnotes cited by Clark prohibits putting before this Court new case law to support an appellant's argument. The first case cited by Clark stated that because the party had not stated the issue in its petition for review. Estate of Berkemeir ex rel. Nielsen v. Hartford Ins. Co. of Midwest, 2004 UT 104 ¶10, 106 P.3d 700, 702 n.2 (Utah 2004). In the instant case, however, Archer did preserve the issue in his petition for certiorari.

Clark then cites to Trail Mountain Coal Co. v. Utah Div. of State Lands & Forestry, 921 P.2d 1365, 1371 n.11 (Utah 1996). In Trail Mountain, the Court took issue with an issue that was raised for the first time in the appellant's reply brief. Archer has not waited until this Reply Brief to raise this issue. Archer preserved the issue in the Petition for Certiorari and fleshed the issue out in his Opening Brief. Archer has not waived his right to now be heard by this Court on whether the interlocutory appeal constituted sufficient notice to preserve his appellate rights under the Bonelli case.

Archer properly preserved this issue on appeal through his Docketing Statement and Petition for *Writ of Certiorari*. Further, the Court has specifically asked

the parties to address the issue with whether the Court of Appeals had erred in claiming that it lacked jurisdiction to hear the appeal. This issue is fleshed out more specifically by Archer in his Opening Brief. Archer has properly raised the argument on the issue currently before this Court.

III. THE TRIAL COURT'S 54(b) CERTIFICATION OF THE RULING ON THE SECOND AND NINTH CAUSES OF ACTION WAS IMPROPER AS THE STATUTE OF LIMITATIONS HAD RUN AND THE FACTUAL ALLEGATIONS BETWEEN THE SECOND AND NINTH CAUSES OF ACTION OVERLAPPED WITH THE REMAINING CAUSES OF ACTION.

Clark raises three points in his argument that the trial court properly decided and certified the second and ninth causes of action in Clark's amended complaint. Archer does not dispute the first issue raised by Clark, that the amended complaint involved both multiple claims and multiple parties.

The second issued raised, however, does present a problem with Clark's argument. The trial court based its decision on Clark's claim that the warranty deed had not been legally "delivered" to Archer. Clark's citation to the trial court's order, however, fails to mention that Clark failed to bring his action until after the statute of limitations had expired on his cause of action. The trial court was unable to reach the merits of Clark's claim for failure of delivery without resolving the fact that Clark's claim was filed after the statute of limitations had run. The trial court stated

> The second cause of action for failure of delivery remains timely and viable today as well. The timeliness of this cause of action was the issue addressed by the supplemental briefing of the parties as requested by the Court. The second cause of action for failure of delivery remains timely based on the content of Archer's Affidavit. Originally, the Court was focused on the principle or doctrine of the discovery rule in relationship to the application of the statue of limitations to the second cause of action of the amended complaint. However, the Court need not rely upon or analyze the application of the discovery rule because of the content of Archer's Affidavit.

R. 460.

The trial court relied on an affidavit filed by Archer in the trial court after Clark had commenced the action as the reaffirmation of a debt that extended the statute of limitations under Utah Code Annotated §78B-2-113(1)(b). What the trial court failed to consider is that the terms of U.C.A. §78B-2-113(1)(b)[1] only apply where the affirmation of an outstanding debt comes within the timeframe for bringing an action on that outstanding debt. State Bank v. Troy Hydro Sys., 894 P.2d 1270, 1276 (Utah App. 1995). In this case, where the affidavit came after the statute of limitations had run on the underlying cause of action, Archer's affidavit could not be used to act as a reaffirmation of any debt. Troy Hydro Sys., 894 P.2d at 1276. Therefore, regardless of whether delivery of the deed was effective, the entire matter was improperly before the trial court as the statute of limitations had expired.

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[1] U.C.A. §78B-2-113(1)(b)states in relevant part: Effect of payment, acknowledgment, or promise to pay
(1) An action for recovery of a debt may be brought within the applicable statute of limitations from the date:
(b) a written acknowledgment of the debt or a promise to pay is made by the debtor,

Clark's final point, that the trial court's ruling met the requirement of "finality" necessary to allow the court to certify the issue for appeal under Rule 54(b), fails to counter the arguments raised by Archer in his Opening Brief. Specifically, Archer points to the argument and citations presented to the Court on pages 12 – 17. In that discussion, Archer demonstrates that the trial court's certification was improper. The factual issues the trial court attempted to resolve in its ruling overlapped with the factual issues of the remaining causes of action.

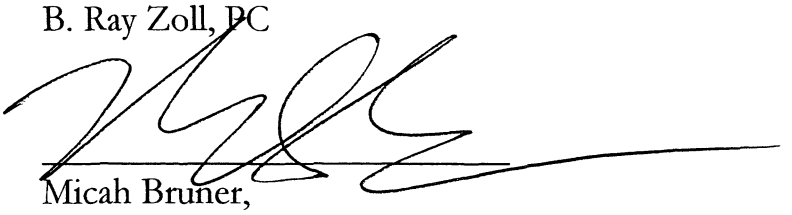
As demonstrated in Weiser v. Union Pac. R.R., 932 P.2d 596 (Utah 1997), Clark's second cause of action contained factual overlap with the remaining causes of action. A successful appeal by Archer on this one cause of action will allow Clark to return to the trial court in an attempt to regain possession of the land through another cause of action raised in his amended complaint. The appeal of the trial court's Rule 54(b) certified cause of action would, therefore result in a piecemeal appeal. This is precisely what this Court has sought to avoid throughout the cases that have been brought under a Rule 54(b) certification. Id. at 597. Accordingly, Clark's argument on finality fails to meet the three-prong test for certification to be proper under Rule 54(b).

III. CONCLUSION

For the reasons stated above, along with the reasons stated in his Opening Brief, Archer respectfully requests that this Court determine that the Court of Appeals did have jurisdiction to hear Archer's appeal on the issues raised at the trial court.

Respectfully submitted this 15th day of January 2009.

B. Ray Zoll, PC



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Reply Brief was served via U.S. mail, first class, postage pre-paid to the following:

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This 15th day of January 2009